Supreme Court, U.S.
FILED

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No. _____ OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

MORETON ROLLESTON, JR.,

Petitioner,

vs.

ESTATE OF REBECCA WIGHT CHERRY SIMS,
JOHN RANDOLPH CHERRY, EXECUTOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

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61 pp

QUESTIONS PRESENTED FOR REVIEW

1.

The original complaint was a malpractice suit for alleged professional negligence of an attorney. The trial judge charged the jury that there was a twenty year statute of limitations applicable to Georgia's statute regarding contribution. Georgia has a two year statute of limitations for ordinary torts and a five year statute of repose for professional negligence of physicians. The Georgia **statute for contribution does not contain any statute of limitations.** The twenty year statute of limitations regarding contributions, as charged by the trial court, can only apply to

attorneys for defendants in a civil action.

Questions for Review is whether the twenty year statute, as charged, violates the equal protection of laws as set forth in the Fourteenth Amendment of the U.S. Constitution and Article 1, Section 1, Paragraph 2 of the Georgia Constitution and whether or not it also constitutes an illegal taking in violation of the Fifth Amendment to the Constitution of the United States and the Georgia Constitution, Article I, Section 3, Paragraph 1.

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The order of the Supreme Court of Georgia denying the Motion for Reconsideration is set forth in the Appendix (A-1). The Court of Appeals of Georgia affirmed the trial court's judgment and jury verdict and denied a Motion for Reconsideration. A petition

for Writ Of Certiorari was filed in the Georgia Supreme Court which was denied by that Court. A Motion for Reconsideration was filed in the Georgia Supreme Court and this Motion was denied on November 21, 1997.

The grounds upon which jurisdiction of this Court is invoked are the denial of due process as guaranteed by the Fifth Amendment to the Constitution of the United States and the denial of equal protection of the laws under the Fourteenth Amendment.

The date of entry of the Order of the Georgia Supreme Court was November 21, 1997.

The jurisdiction of this Court to review the judgment of the Court of Appeals of Georgia and the jury charge

is invoked under 28 U.S.C.§1254(11).

STATEMENT OF CASE

The trial judge made the following charge:

> "I charge you that the statute of limitations for contribution and indemnity is 20 years, and all actions for enforcement of rights occurring to individuals under the statute must be brought within 20 years after the right of action accrues.I further charge you that a claim for contribution based on tort does not accrue and the statute of limitations does not start to run until the judgment is entered on the principal suit."

The principal suit referred to by

the trial judge was the case of Estate of Rebecca Wight Cherry Sims, J. Randolph Cherry, Executor, vs. Moreton Rolleston, Jr. and the date of the opinion was March 6, 1995, copy of which appears in Appendix B-1.

The Georgia Supreme Court denied a Writ of Certiorari to the Georgia Court of Appeals and on November 21, 1997 the Supreme Court of Georgia denied a Motion for Reconsideration, a copy of which appears in Appendix A-1.

The Constitutional questions were first raised in the appeal to the Court of Appeals of Georgia.

ARGUMENT

Georgia's contribution statute, Official Code of Georgia Annotated §23-2-71, reads as follows:

> "In cases of joint, joint and several, or several liabilities of two or more persons, where all are equally bound to bear the common burden and one has paid more than his share, he shall be entitled to contribution from the others; and whenever the circumstances are such that an action at law will not give a complete remedy, equity may entertain jurisdiction."

There have been no previous cases before the Supreme Court of Georgia or the Court of Appeals of Georgia in which this contribution statute has been adjudicated.

Physicians have been smarter than lawyers. They persuaded the Legislature

in 1985 to pass a five year statute of ultimate repose (O.C.G.A. §9-3-71 (c)). This Court has considered the constitutionality of that statute of repose in **Craven v. Lowndes County Hospital Authority**, 263 Ga. 656; **Mansfield v. Pannell**, 261 Ga. 243 and **Crowe v. Humana**, 263 Ga. 833.

The U.S. District Court for the Northern District of Georgia has held that:

> "The statute of repose for medical malpractice claims is rationally related to a legitimate legislative attempt to reduce the uncertainties and costs related to malpractice litigation long after the medical services have been

rendered and does not violate equal protection guarantees. **Hanflik v. Ratchford**, 848 F. Supp. 1539 (N.D. Ga. 1994)."

The District Court in substance adopted O.C.G.A. §9-3-71 in the following language:

"The findings of the General Assembly under this Code section include, without limitation, that a reasonable relationship exists between the provisions, goals, and classifications of this Code section and the rational, legitimate state objectives of providing quality health care, assuring the availability of physicians, prevent-

ing the curtailment of medical services, **stabilizing insurance and medical costs, preventing stale medical malpractice claims**, and providing for the public safety, health and welfare as a whole." (Emphasis added.)

O.C.G.A. 9-3-71 reads as follows:

"(a) Except as otherwise provided in this article, an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred.

(b) Notwithstanding sub-

section (a) of this Code section, in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred.

(c) Subsection (a) of this Code section is intended to create a two-year statute of limitations. Subsection (b) of this Code section is intended to create a five-year statute of ultimate repose and abrogation.

(d) Nothing contained in subsection (a) or (b) of

this Code section shall be construed to repeal Code Section 9-3-73, which shall be deemed to apply either to the applicable statutes of limitation or repose."

O.C.G.A. §9-3-73 (f), which was referred to in O.C.G.A. §9-3-71 (d), reads as follows:

"The findings of the General Assembly under this Code section include, without limitation, that a reasonable relationship exists between the provisions, goals, and classifications of this Code section and the rational, legitimate state objectives of providing quality health

> care, assuring the availability of physicians, preventing the curtailment of medical services stabilizing, insurance and medical costs, **preventing stale medical malpractice claims,** and providing for the public safety, health, and welfare as a whole."

There is room for argument as to whether legal services are as important as health services, but there is no rational argument against stabilizing legal costs and insurance.

The constitutionality question can be stated briefly. A two year statute of limitations applies to ordinary torts. The physicians now have a statute of repose for five years. The trial court

imposed a 20 year statute of limitations on lawyers if the lower court's opinion is allowed to stand. Thus in a tort action, protection against lawsuits depend on who you are and that is foreign to our usual sense of fairness as well as violative of constitutional prohibitions.

The implications of allowing this decision to stand are significant. First, with the abrogation of the two year tort and four year contract statutes of limitation, an attorney's liability can be almost without end. Not only is the period of limitations twenty years, it doesn't begin to run until the entry of judgment against the client which, **as in this case**, can be years after the lawyer ceased representing the

client.

The reduction of uncertainties and costs related to professional litigation long after the professional services have been rendered is a legitimate goal and has supported equal protection challenges to the medical malpractice statutes of limitation and statute of repose. **Craven v. Lowndes County Hospt. Auth.**, 263 Ga. 657 (1993); **Hanflik v. Ratchford**, 848 F. Supp. 1539 (N.D. Ga. 1994).

Further, allowing claims for legal malpractice to be subject to a 20-year statute of limitation violates equal protection for attorneys. Since a right of contribution or indemnity only arises when a dollar judgment is entered against the client, the only lawyers

whose liability may extend for twenty or more years are those lawyers who represent civil defendants. Potentially malpracticing plaintiffs' lawyers must be sued within two to four years as no monetary judgment is entered against the plaintiff. The same applies to non-litigators and criminal lawyers. The only group of attorneys in the entire bar who are faced with this discriminatory treatment are those who represent defendants in civil cases.

The charge to the jury by the trial judge was in error and prejudicial because the contribution statute, as applied below, violates the equal protection of the laws as set forth as follows:

Amendment 14 to the U.S.Constitu-

tion reads as follows, in pertinent part:

> "No state shall -- deny to any person within its jurisdiction the equal protection of the laws."

Georgia Constitution, Article I, Section I, Paragraph II reads as follows:

> "No person shall be denied the equal protection of the laws."

The contribution statute also violates the **Fifth Amendment to the Constitution of the United States**, which reads in pertinent part as follows:

> "No person -- shall -- be deprived of life, liberty or property, without due process

> of law; nor shall private property be taken for public use, without just compensation."

The contribution statute also constitutes an illegal taking from lawyers in violation of the **Constitution of the State of Georgia, Article I, Section III, Paragraph I (a)**, which reads as follows:

> "Except as otherwise provided in this paragraph, private property shall not be taken or **damaged** for public purposes without just and adequate compensation being first paid."

If one agrees that the application of a 20 year contribution statute to lawyers would result in higher insurance costs, then one must also agree that

lawyers would be **damaged** economically.

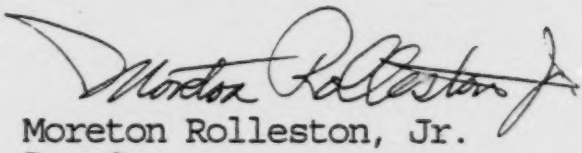
We have found only three cases which have been decided in other jurisdictions, each recognizing that substance, not nomenclature, governs and each rejected the indemnity claims and their longer statutes of limitation. **Bunker v. Maccaro**, 437 N.Y. S.2d 326 (N.Y. 1981); **Griggs v. Nash,** 775 P. 2d 120 (Idaho, 1989); **Gary v. Wallman & Kramer,** 224 A.D. 2d 275; 638 N.Y.S. 2d 18 (1966).

The jury charge by the trial judge was prejudicial to the rights of the Defendant below (Petitioner herein). As a result of the trial Judge's interpretation of the applicable statute of limitations, as expressed in his charge, the Court allowed evidence of acts

during the years of 1983 through 1995. During this time the principal parties were involved in four lawsuits, three appeals to the Georgia Supreme Court and several controlling contracts. Such evidence was not admissible. The Petitioner is entitled to a new jury trial.

The challenge we bring to this Court is the illegal and unconstitutional jury charge of the trial judge which was allowed to stand by the Court of Appeals of State of Georgia to the extreme detriment of this Petitioner. The judgment against Petitioner was for $5,200,000 whereas the Estate's loss was only $500,000.

We respectfully request that this Petition for a Writ of Certiorari be granted.



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APPENDIX

Appendix A

SUPREME COURT OF GEORGIA

Case No. S97C1616

Atlanta, November 21, 1997

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

MORETON ROLLESTON, JR. v. JOHN RANDOLPH CHERRY, EXEC.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Sears, J., not participating.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk.

Appendix B

THIRD DIVISION

POPE, P.J.

JOHNSON and BLACKBURN, JJ.

March 6, 1997

In the Court of Appeals of Georgia

A97A0051, A97A0056. ROLLESTON v. CHERRY (two cases). BL-003, BL-004

BLACKBURN, Judge.

The estate of Rebecca Wight Cherry Sims (Cherry) sued Moreton Rolleston, Jr., Cherry's former attorney, alleging claims of professional negligence, breach of fiduciary duty, fraud, contribution and indemnity. The jury returned a verdict against Rolleston in the

amount of $5,200,000. Rolleston appeals, contending that the trial court made numerous errors in charging the jury and in failing to grant Rolleston's motions for summary judgment and directed verdict.

Cherry owned a one-fourth undivided interest in certain beach property on St. Simons Island known as Camellia Cottage. Over the years, as the ocean receded, additional land had accreted between Camellia Cottage and the ocean. In August 1983, Cherry hired Rolleston, a long time family friend, to establish title to the accreted land. Cherry signed a contingency fee agreement under which Rolleston would be entitled to one-third of any accreted land to which title was established. Cherry executed

a quitclaim deed to Rolleston of a one-third undivided interest in such land, although Rolleston did not immediately record such deed.

Rolleston filed suit on behalf of Cherry against the Hopkins family, rival claimants to the accreted land, seeking to establish title to or a recreational easement over such land. The trial court granted summary judgment in favor of Hopkins, but the Supreme Court reversed on April 16, 1985 in Cherry v. Hopkins, 254 Ga. 260 (328 SE2d 702) (1985), sending the case to trial.

In July 1984, while the Hopkins litigation was pending, Cherry entered into an agreement with Tom Davis for the sale of her interest in Camellia Cottage. The agreement also gave Davis

a separate option to purchase the accreted land if the Hopkins litigation were successful. The agreement was drafted by Rolleston. As subsequently revised, the agreement provided that closing on the sale of Camellia Cottage would take place on May 31, 1985 or 30 days after entry of a final order in the Hopkins litigation, whichever occurred first.

After the purchase contract was executed, Davis learned that Rolleston had taken a quitclaim deed to the accreted land. In a letter to Rolleston, Davis expressed his concern that the deeds could prevent Cherry from being able to convey good title to Camellia Cottage by destroying any claim to a recreational easement over the

accreted land. This letter also alerted Rolleston to the possibility that the sale of Camellia Cottage would extinguish his client's claim to the recreational easement over the accreted land, which interest Rolleston was seeking to establish in the Hopkins litigation.

At the trial of Cherry v. Hopkins, May 26-30, 1986, Rolleston failed to raise the issue of a recreational easement, and the sole issue litigated was title to the land. The jury re-tuned a verdict in favor of Hopkins on May 30, 1986, which was subsequently affirmed by the Supreme Court.

The closing on the sale of Camellia Cottage was scheduled for May 31, 1985, the day after the trial of Cherry v.

Hopkins. Rolleston was advised that Davis was assigning his rights under the purchase contract to parties who would consummate the closing. However, Rolleston told Cherry that she need not attend the closing because the purchaser was unlikely to have the purchase price. Rolleston appeared at the closing without Cherry and without a power of attorney to execute the necessary closing documents.

At the closing, Rolleston was informed that Davis' assignee, Coast House, Lt., was prepared to close. However, Rolleston presented Davis with a letter, dated June 1, 1985, stating that Davis had breached the purchase contract by not timely closing, and that the entire contract, including the

option for the accreted land, was now void. Rolleston then left the closing. Coast House's representatives attempted to consummate the closing by travelling to Cherry's house with the purchase money, but Cherry was not there. Ont he morning after the failed closing, Rolleston recorded his quitclaim deed to the accreted land.

In December 1985, Coast House sued Cherry for breach of contract, and also asserted a claim against Rolleston for tortious interference with contractual relations. After Cherry and Rolleston filed counterclaims, Coast House added a claim for abusive litigation against the two parties. On September 14, 1987, the trial court severed the trials of Cherry and Rolleston, and the claims against

Cherry were to be tried firs. Shortly before trial, on May 15, 1990, Coast House dismissed the action without prejudice and refiled against Cherry, without naming Rolleston in this renewal action. Cherry had died on May 18,1989. On February 27, 1991, the jury returned a verdict against her estate on both the breach of contract claim and the abusive litigation claim.

The estate subsequently settled with Coast House, agreeing in part that Coast House would receive a portion of the proceeds of an action to be filed against Rolleston. On February 20, 1992, the estate brought the present action against Rolleston for professional negligence, fraud, breach of fiduciary duty, and contribution and

indemnity, and Rolleston appeals from the March 22, 1995 jury award of $5,200,000 to the estate.

Case No. A97A0051

1. (a) In his first enumeration of error, Rolleston contends that the trial court erred in failing to charge the jury that a two year statute of limitations applies to torts, a four year statute of limitations applies to contracts, and a two year statute of limitations applies to claims of breach of fiduciary duty. However the brief, prepared by Rolleston, does not address these enumerations, but instead argues that the relevant statutes of limitation had expired on plaintiff's claims. Accordingly, these enumerations are deemed abandoned. Court of Appeals Rule

27 (c) (2). As "an enumeration of error cannot be enlarged by a brief to give appellate viability to an issue not contained in the original enumeration," this court will not consider Rolleston's arguments that the statutes of limitation had expired. (Punctuation omitted.) Crotty v. Crotty, 219 Ga.App. 408, 410 (3) (465 SE2d 517) (1995). In any event the requested charge was not a correct statement of the law, and it would have been error to have given it as requested.

(b) Rolleston's first enumeration also contends that the court erred by allowing testimony regarding Rolleston's fiduciary duties after he resigned his representation of Cherry in October 1988. However, as Rolleston does not address

this assertion in his brief, cite to any testimony alleged to have been erroneously admitted, or show that he presented this issue for appeal by objecting at rial, this assertion will not be considered. Court of Appeals Rule 27 (c) (2), (3); Langton v. Dept. of Corrections, 220 Ga. App. 445, 446 (2) (469 SE2d 509) (1996) (court will not cull the record on behalf of a party). Furthermore, even if this assertion had been supported in the brief, it would not be considered by this court, as the first enumeration contains more than one assertion of error in violation of OCGA § 5-6-40. See West vs. Nodvin, 196 Ga. App. 825, 830 (4) (c) (397 SE2d 567) (1990).

Throughout his brief, which was

submitted by Rolleston and not his by his attorney, Rolleston fails to provide record citations to evidence necessary to evaluate his arguments. It should be noted that the record in this case comprises twenty volumes and more than 6,500 pages. The trial transcript alone consists of over 2,600 pages, covering the testimony of twenty-one witnesses, arguments of counsel, and the court's charges. The trial exhibits consist of over 1,000 pages. We have repeatedly held that "[i] is not the function of this court to cull the record on behalf of a party." Langton, supra at 446 (2). This rule is particularly apt in this case. While this court is authorized under its rules to dismiss any appeal for failure to cite to the record, we

will exercise our discretion and resolve this appeal on its merits.

2. (a) In addition to claims of malpractice, breach of fiduciary duty, and fraud, the estate asserted a claim against Rolleston for contribution and indemnity, seeking contribution for the damages it sustained as the result of an adverse jury verdict in the Coast House lawsuit. Coast House sued Cherry for failing to close under the real estate sales contract drafted by Rolleston, and also asserted a claim against Rolleston for tortious interference with contract in connection with the failed closing. After Cherry and Rolleston filed counter-claims, Coast House added a claim for abusive litigation against the two parties. The trial court severed

the trials of Cherry and Rolleston, and the claims against Cherry were tried first. The jury returned a verdict against Cherry's estate on both the breach of contract claim and the abusive litigation claim.

On appeal, Rolleston contends the court erred in charging the jury on contribution and indemnity, because such charge was not warranted by the evidence.1

---

1 Rolleston does not contend that the court's charge was an incorrect statement of the law. Accordingly, we do not address that issue.

In reviewing a jury instruction, this court must determine if there was any evidence presented at trial to support it. Valdez v. Power Industry Consultants 215 Ga. App. 444 (451 SE2d 87) (1994). It is the duty of the trial court to instruct the jury on an issue of law if there is evidence to support the instruction. Feathers v. Wilson, 157 Ga. App. 753 (278 SE2d 434) (1981).

In essence, Rolleston asserts that he cannot be considered a joint tortfeasor with Cherry, and so cannot be liable for contribution and indemnity. However, the verdict in the Coast House lawsuit was not totally predicated upon Cherry's breach of contract; at least a portion of the award related to Coast

House's claim for abusive litigation, which was based on the joint conduct of Cherry and Rolleston. Indeed, Cherry and Rolleston had originally been named as joint defendants on such claim, although the trial court severed the trials of the two. In his appellate brief, which was personally drafted by Rolleston, Rolleston states that the trial court granted summary judgment to him on all charges, and that the Supreme Court affirmed. This is a misrepresentation of the facts, as the trial court expressly denied Rolleston's motion for summary judgment on the abusive litigation claim, and the Supreme Court expressly upheld that denial. See Cherry v. Coast House, Ltd., 257 Ga.

403, 407 (359 SE2d 904) (1987) ("We affirm the denial of summary judgment to (Rolleston) as to any Yost v. Torok claim which might now exist or arise in the future"). Since Cherry's liability to Coast House was at least partially predicted upon acts for which Cherry and Rolleston could be considered joint tortfeasors, Cherry was entitled to seek contribution from Rolleston under OCGA §51-12-32, notwithstanding the fact that Coast House apparently did not pursue its abusive litigation claim against Rolleston. See Marchman & Sons v. Nelson, 251 Ga. 475 (306 SE2d 290) (1983). Accordingly, the trial court did not err in charging the jury on contribution and indemnity.

(b) In this same enumeration, Rolleston also asserts that the court erred in charging the jury that the statute of limitations for contribution and indemnity claims is twenty years. As Rolleston failed to support this assertion in his brief by argument, citation of authority, or citation to the record, it is deemed abandoned. Moreover, this assertion is groundless on the merits, as the applicable statute of limitations for such claims is in fact twenty years. See OCGA §9-3-22; Krasaeath v. Parker, 212 Ga.App. 525 (441 SE2d 868) (1994) (actions for contribution between joint tortfeasors governed by 20 year statute of limitations); see also Union Carbide

Corp. v. Thiokol Corp., 890 FSupp. 1035 (S.D.Ga. 1994) (actions for contribution and indemnity governed by 20 year statute of limitations).

3. Rolleston contends that the trial court erred in not holding that a letter from Cherry's attorney to Rolleston's attorney constituted a release of any claims against Rolleston. In this letter, Cherry's attorney stated that no action would be filed against Rolleston "for any of his acts or omissions relating to his draftsmanship of the sales contract at issue in [the Coast House] lawsuit, acts omissions, negotiations and other, or the failed closing on May 31, 1985, or his activities leading up to said failed

closing."

As an initial matter, Rolleston does not cite to any portion of the record in which he asked the court to rule that the letter constituted a release. "[W]e are limited on appeal to those grounds presented to and ruled upon by the trial court." (Punctuation omitted.) Adams v. Coweta County, 208 Ga. App. 334, 336 (3) (430 SE2d 599) (1993). This court will not cull the record on behalf of a party, particularly in a case such as this where the record is voluminous. See Langton, supra at 446 (2) (failed to show where in record request was made for oral argument).

Moreover, this enumeration is

groundless on the merits. The letter does not on its face purport to be a release, but merely a statement of Cherry's intentions regarding bringing a malpractice action. There was testimony that the letter was sent after Rolleston had threatened to bring an abusive litigation action if Cherry sued him for malpractice. There was also testimony that Cherry was financially unable to bring an action against Rolleston at the time the letter was written. Whether this letter was merely intended to advise Rolleston of Cherry's present intentions, or was intended as a binding release, was a question of fact for the jury. See Johnston v. Ruppert, 177 Ga. App. 883 (341 SE2d 293) (1986) (where

document ambiguous, question of fact remained regarding whether party intended to release other).

Rolleston argues that he relied on this letter by helping Cherry prepare for the Coast House lawsuit. However, once again, Rolleston does not cite to the record to show that he in fact provided such assistance or that such assistance was in reliance on the attorney's letter. Cherry's attorney testified that Rolleston provided only minimal help with the lawsuit, and charged $200 per hour for his services. Whether this assistance was in reliance on the letter was a question of fact for the jury's determination.

4. Rolleston contends the court

erred in failing to charge the jury that a contract between Coast House and the estate, pursuant to which Coast House would receive a portion of any proceeds from this suit, was champertous and void as against public policy. The Court did not err in refusing to give such a charge, as champerty is no defense to Rolleston's liability. "[T]he fact that there is an illegal and champertous contract for the prosecution of an action is no ground for an abatement of such action, nor a defense thereto." Ellis v. Smith & Bussey, 112 Ga. 480, 484 (37 SE 739) (1900). Thus, even if the contract between the estate and Coast House were champertous, this would not constitute a defense to the estate's

action against Rolleston.

5. Rolleston asserts that the court erred in failing to charge the jury that the assignment of the estate's claim to Coast House was illegal in violation of OCGA §44-12-24. He also contends the court erred in failing to charge that the estate's damages were limited to $500,000 plus attorneys' fees, and that "a legal opinion rendered by a lawyer, even if in error, does not constitute malpractice." Rolleston failed to provide any record cites to show that he made written requests for such charges, and our own review of the record reveals that Rolleston did not make such requests. Accordingly, these enumerations are without merit. Service

Merchandise v. Jackson, 221 Ga. App. 897, 900 (2) (473 SE2d 209) (1996).

6. In his enumerations of error, Rolleston contends that the trial court erred in giving an excessive, unduly broad and prejudicial fraud charge, as there was no evidence of fraud. In his brief, Rolleston limits this enumeration to his contention that there was no evidence of fraud, abandoning any contention that the court's charge was erroneous as given. See Court of Appeals Rule 27 (c) (2).

The only argument Rolleston advances in support of this enumeration is that none of the estate's three expert witnesses testified that Rolleston committed fraud. However, the

fact that the word "fraud" was not used by the witnesses is irrelevant, as there was ample evidence to justify a fraud charge. After drafting the real estate sales contract at issue, Rolleston was put on notice that, if the sale were consummated, his client might forfeit her claim to a recreational easement over adjoining property, which claim Rolleston was asserting in a separate lawsuit. Rolleston then told Cherry not to attend the closing because the purchaser would not be able to close, although he had been put on notice that the original purchaser was assigning his rights under the purchase contract to an assignee who was able to close.

Rolleston appeared at the closing

without Cherry and without a power of attorney to execute the necessary closing documents. Although the purchaser's assignee, Coast House, informed Rolleston that it was ready to close, Rolleston refused to close. Instead, he presented a letter, dated the next day, stating that the purchaser had breached the purchase contract by not timely closing, and that the contract was now void.

The jury was authorized to conclude from the evidence that Rolleston intentionally misled his client in order to prevent the closing, so as to avoid a potential malpractice claim for his drafting of the purchase agreement. As there was evidence from which the jury

could infer fraud, the court did not err in instructing the jury on the law of fraud. See Feathers, supra, 157 Ga.App. at 753(1) (trial court must instruct jury on issue of law if there is evidence to support this instruction).

7. Rolleston contends the trial court erred in failing to charge that Cherry had ratified all of Rolleston's actions. Rolleston's brief does not identify the charge alleged to have been erroneously refused, and fails to cite to the record to show that he actually requested such a charge. Our review of the record reveals that Rolleston did not request in writing a charge that Cherry had ratified Rolleston's actions. Thus, this enumeration is meritless. See

Service Merchandise, supra.

Rolleston did ask the court to charge that a principal who has ratified the acts of her agent may not then sue such agent, and that the jury should find for Rolleston if it found that Cherry had ratified his acts. The court did not err in refusing to give such charges, as they are not a complete statement of the law of ratification. Such charges fail to define the term "ratification", fail to state that the burden of proving ratification is on the party asserting it, and fail to state that ratification is ineffective unless made with full knowledge of the material facts. See Hendrix v.First Bank of Savannah, 195 Ga.App. 510, 511 (1) (394

SE2d 134) (1990). Accordingly, the court's refusal to give such charges was not error. See Preferred Risk Ins. Co. v. Boykin, 174 Ga. App. 269, 276 (9) (329 SE2d 900) (1985).

8. Rolleston contends the trial court erred in charging that a violation of the Standards of Conduct constitutes legal malpractice. Rolleston fails to cite to the charge he contends was erroneous, and fails to demonstrate that he preserved any error by objecting to the charge.

Nevertheless, our review of the record reveals that the trial court did not charge the jury that a violation of the standards of conduct constitutes legal malpractice. Rather, the court

charged the jury that such rules could be taken into consideration by them in determining whether Rolleston had committed professional negligence. This is a proper statement of the law under Allen v. Lefkoff, Duncan, Grimes & Dermer, 265 Ga. 374, 377 (453 SE2d 719) (1995) (bar rules not determinative of standard of care applicable in legal malpractice actions, but may be considered along with other facts and circumstances).

9. In his final enumeration of error, Rolleston contends that the trial court erred in failing to grant his motion for directed verdict and motion for summary judgment. As Rolleston omitted this enumeration from

his argument in his brief, it is abandoned. Court of Appeals Rule 27 (c) (2).

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Rolleston also filed a notice of appeal of the trial court's order requiring a supersedeas bond. As Rolleston has not filed enumerations of error relating to this appeal, or addressed it in his brief, it is abandoned.

Judgments affirmed. Pope, P.J. and Johnson, J. concur.

Supreme Court, U.S.
FILED
APR 3 1998
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No. 97-1445

In The

Supreme Court of the United States

October Term, 1997

MORETON ROLLESTON, JR.,

Petitioner,

v.

The Estate of REBECCA WIGHT CHERRY SIMS, JOHN RANDOLPH CHERRY, Executor,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

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PETITIONER'S QUESTIONS PRESENTED FOR REVIEW

The original complaint was a malpractice suit for alleged professional negligence of an attorney. The trial judge charged the jury that there was a twenty-year statute of limitations applicable to Georgia's statute regarding contribution. Georgia has a two-year statute of limitations for ordinary torts and a five-year statute of repose for professional negligence of physicians. The Georgia **statute for contribution does not contain any statute of limitations.** The twenty-year statute of limitations regarding contributions, as charged by the trial court, can only apply to attorneys for defendants in a civil action.

Questions for Review is [sic] whether the twenty-year statute, as charged, violates the equal protection of laws as set forth in the Fourteenth Amendment of the U.S. Constitution and whether or not it also constitutes an illegal taking in violation of the Fifth Amendment to the Constitution of the United States and the Georgia Constitution, Article I, Section 3, Paragraph 1.

PARTIES TO THE PROCEEDINGS

The Petitioner has accurately identified the parties to the proceeding.

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OPINION AND JUDGMENT BELOW

The Petitioner seeks review of a jury charge on contribution given by the trial court but neither the jury verdict rendered March 22, 1995 nor the Judgment on Jury Verdict entered April 7, 1995 were appended to his Petition. They are reproduced herein as Respondent's Appendix "A".

The opinion by The Court of Appeals of the State of Georgia, cited as 226 Ga. 750, 487 S.E.2d 354 (1997), was appended to Petitioner's Brief as Appendix "B" and is not reproduced herein.

The order of the Court of Appeals of Georgia denying Petitioner's Motion for Reconsideration was entered June 11, 1997, and is reproduced herein as Respondent's Appendix "B".

The order of the Supreme Court of Georgia Denying Petitioner's Application for Writ of Certiorari was entered October 31, 1997 and is reproduced herein as Respondent's Appendix "C".

The order of the Supreme Court of Georgia denying Petitioner's Motion for Reconsideration was appended to Petitioner's Brief as Appendix "A" and is not reproduced herein.

STATEMENT OF JURISDICTION

A. The Judgment on Jury Verdict was entered by the Superior Court of Fulton County, State of Georgia, on April 7, 1995.

B. The Court of Appeals, State of Georgia, rendered its opinion, with all judges concurring, on March 6, 1997.

C. Respondent acknowledges that if the case below otherwise presented a proper case for certiorari, jurisdiction would be proper under 28 U.S.C. §1254(1) [cited by Petitioner as 28 U.S.C. §1254(11)] but denies that Petitioner presents a proper case for the grant of writ of certiorari.

GEORGIA STATUTES INVOLVED

O.C.G.A. §51-12-32:

(a) Where a tortious act does not involve moral turpitude, contribution among several trespassers may be enforced just as if an action had been brought against them jointly. Without the necessity of being charged by action or judgment, the right of a joint trespasser to contribution from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom.

(b) If judgment is entered jointly against several trespassers and is paid off by one of them, the others shall be liable to him for contribution.

(c) Without the necessity of being charged by an action or judgment, the right of indemnity, express or implied, from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom.

O.C.G.A. §23-2-71:

In cases of joint, joint and several, or several liabilities of two or more persons, where all are equally bound to bear the common burden and one has paid more than his share, he shall be entitled to contribution from others; and whenever the circumstances are such that an action at law will not give a complete remedy, equity may entertain jurisdiction.

ERRORS AND OMISSIONS IN PETITIONER'S STATEMENT OF THE CASE

Petitioner has substantially misrepresented to this court essential material facts in the underlying case and the state court appeals thereof, either by direct misstatement or by omission, the most blatant examples of which are set forth hereafter:

1. Contrary to Petitioner's assertion, [Petitioner's Brief, page 4] no constitutional question was raised by Petitioner in either the trial court or the court of appeals, [see excerpts from Petitioner's Briefs filed in the Court of Appeals of the State of Georgia, to wit: Enumeration of Errors (Appendix "D"), Appellant's Brief (Appendix

"E"), Appellant's Reply Brief (Appendix "F") and Appellant's Motion for Reconsideration (Appendix "G")]

2. Petitioner contends that the trial court erroneously charged the jury on contribution in a legal malpractice case resulting in a $5,200,000.00 judgment against Petitioner but neglects to inform this Court that the case below alleged five distinct and separate legal causes of action against Petitioner (to wit: legal malpractice, breach of fiduciary duty, fraud and fraudulent concealment, contribution and indemnity) and that it is impossible to determine the basis of the jury's finding of liability and damages from the jury's general verdict form (with which Petitioner himself concurred in open court at trial). [See Appendix "A", Judgment on Jury Verdict].

3. Petitioner contends that "the Georgia *statute for contribution does not contain any statute of limitations* (emphasis in original), and the trial court erred in charging the jury that there was a twenty-year statute of limitations applicable to Georgia's statute." [Petitioner's Brief, p. i]. As stated by Judge Blackburn in the Opinion of the Court of Appeals of Georgia, "this assertion is groundless on the merits as the applicable statute of limitations for such claims is in fact twenty years." See O.C.G.A. §9-3-22, *Kraseath v. Parker*, 212 Ga. App. 525, 441 S.E.2d 868 (1994), (actions for contribution between joint tortfeasors governed by 20 year statute of limitations) [Opinion, Petitioner's Brief, Appendix "B-18"].

4. Petitioner further neglects to inform the Court that there are two Georgia statutes authorizing recovery of contribution or indemnity where the Defendant is responsible in whole or in part for the injury to a third

party for which Plaintiff has been found liable. Pursuant to O.C.G.A. §51-12-32, the Plaintiff has the right to receive indemnification or contribution from a joint tortfeasor to the extent of the damages for which Plaintiff has been found liable. The Court of Appeals of Georgia specifically found that "since Cherry's liability to Coast House was at least partially predicated upon acts for which Cherry and Rolleston could be considered joint tortfeasors, Cherry was entitled to seek contribution from Rolleston . . . the trial court did not err in charging the jury on contribution and indemnity." [Opinion of the Court of Appeals, Petitioner's Brief, Appendix "B-17"].

5. Finally, Petitioner omitted from his Petition the cardinal fact that he did not enumerate as error in the state court that the charge of which he now complains was an incorrect statement of the law. As stated by Judge Blackburn:

> "Rolleston does not contend that the court's charge was an incorrect statement of the law. Accordingly, we do not address that issue." [Opinion, Petitioner's Brief, Appendix "B-14, footnote 1"]

6. Petitioner also failed to include in his Brief any statement of the facts of the case below material to consideration of Petitioner's challenge to the charge on contribution. Accordingly, Respondent sets forth hereafter such statement of facts. [See also the Opinion, Petitioner's Brief, Appendix "B", pages 1-9, which provides an excellent summary of the cases below].

Respondent's decedent, Rebecca Wight Cherry Sims, and her husband were lifelong friends of Petitioner

Moreton Rolleston, Jr. When Mrs. Cherry consulted Rolleston to review a contract for the sale of her one-quarter interest in a beach front cottage on St. Simons Island, he counseled her instead to file suit for the title or a recreational easement over the accreted beach land lying between Camellia Cottage and the Atlantic Ocean. He obtained a warranty deed from Mrs. Cherry granting him one-third of whatever interest she possessed. His ownership interest in the subject matter of litigation put him in immediate conflict of interest with his client and was ultimately to her great damage and detriment.

While pursuing litigation against the true owners of the accreted land, Petitioner drafted a contract requiring Mrs. Cherry to convey her interest in Camellia Cottage prior to the conclusion of the accreted land litigation. This conveyance would destroy her claim to the accreted land. When the closing date of May 31, 1985 approached, in order to avoid potential malpractice liability, Petitioner conceived an elaborate strategy for preventing Mrs. Cherry from attending the closing and at the same time creating the appearance that the purchasers had failed to close.

Rolleston arrived at the office of the closing attorney on Friday, May 31, 1985 with a court reporter and requested a private meeting with the developer and his counsel. He proceeded to create a transcript of the alleged "closing". Thirty-seven minutes after his arrival – without ever entering the closing room where the purchasers, their attorneys and the lender were awaiting his arrival – Petitioner delivered a letter dated June 1, 1985 to their attorney claiming that purchasers had breached the contract and then he departed. On Monday, June 3, 1985 –

the first business day following the aborted closing – Petitioner filed his deed to a one-third interest in the accreted land which clouded the title, prevented development for years and cost the purchasers, Coast House, Ltd. and Sandease, Ltd., millions of dollars in damages. When the purchasers attempted to negotiate a settlement, Petitioner insisted that he was a party to any settlement by virtue of his one-third deeded interest and refused settlement offers that were clearly in his client's best interest.

Coast House, Ltd., and Sandease, Ltd., filed suit on December 27, 1985 against Mrs. Cherry and Petitioner, seeking specific performance and damages. Mrs. Cherry, who relied entirely on Petitioner's advice and the "transcript of the closing" which he created, was devastated to learn through the testimony of Plaintiff's witnesses at the bench trial on damages in June, 1988, that it was she, through the actions of her attorney, who had breached the contract, resulting in a finding of bad faith against her and Petitioner and an order for specific performance.

Mrs. Cherry terminated Petitioner's representation and threatened a malpractice action if Petitioner refused to indemify her for future damages to be determined at the jury trial. Petitioner refused to contribute or indemnify her damages. A few months later, in May, 1989, Mrs. Cherry was brutally murdered at her home by an itinerant day worker.

Mrs. Cherry's Estate was substituted as Defendant at the jury trial in February, 1991. The jury found the Estate liable for breach of contract and abusive litigation based on Petitioner's conduct and awarded Three Million ($3,000,000.00) Dollars in damages and Eight Hundred

Thousand ($800,000.00) Dollars for bad faith attorneys fees to Plaintiffs.

After the verdict, the Cherry Estate's largest asset was its tort claims against Petitioner which it agreed to pursue in a negotiated settlement with Coast House, Ltd., and Sandease, Ltd. The Estate filed suit against Petitioner in Superior Court of Fulton County, State of Georgia, on February 20, 1992, seeking damages for breach of fiduciary duty, legal malpractice, fraud and fraudulent concealment, contribution and indemnity. The jury awarded the Estate $5,100,000.00 in damages and $100,000.00 in attorney's fees on March 22, 1995, after a twelve day trial in which 19 witnesses for Plaintiff revealed Petitioner's liability for the egregious harm suffered by Mrs. Cherry during her lifetime and by the Estate after her death.

On appeal to the Court of Appeals of Georgia, none of Petitioner's ten Enumerations of Error raised a constitutional question. Petitioner's Motion for Reconsideration likewise failed to address any constitutional issue in the Court of Appeals, as none had been raised in the trial court.

Petitioner raised issues of the constitutionality of the trial court's charges on the law of contribution for the first time in his Petition for Writ of Certiorari to the Supreme Court of Georgia. That Petition was denied on October 31, 1997 and Petitioner's Motion for Reconsideration was denied on November 21, 1997.

Petitioner filed and served his Petition for Writ of Certiorari to this Court on February 19, 1998. He has subsequently filed in this Court a Motion to Stay Trial in

the Superior Court of Fulton County, Georgia, on Plaintiff's second suit, seeking to set aside as fraudulent conveyances Petitioner's transfer of all of his real and personal property – valued in excess of Eight Million (8,000,000.00) Dollars – to the Moreton Rolleston, Jr. revocable living trust, of which he is sole trustee and also a beneficiary. This second suit was filed on April 12, 1995, five days after the entry of judgment on the Five Million Dollar verdict. It is calendared for trial on April 14, 1998. Petitioner's Motion for Stay addressed to Justice Anthony M. Kennedy was denied on March 25, 1998.

REASONS FOR DENYING THE WRIT

There are no compelling reasons for review of the lower state court's decision on writ of certiorari, and multiple reasons for denying the writ:

(a) Petitioner cites no conflict with any decision of the United States court of appeals and a state court of last resort or any departure from the accepted and usual course of judicial proceeding so as to call for an exercise of this Court's supervisory power;

(b) Petitioner cites no decision of a federal question by a state court of last resort that conflicts with another state court of last resort or of a United States court of appeals.

(c) Petitioner cites no important question of federal law that has not been but should be settled by this Court, or that has been decided in a way that conflicts with relevant decisions of this Court.

(d) Petitioner claims that the trial court misapplied a properly stated rule of law, but it is well established that a writ of certiorari is rarely granted for such reason.

(e) Finally, Petitioner failed to raise his constitutional challenge in the court of first instance, Fulton Superior Court. [See Respondent's Appendix "D", Petitioner's Enumerations of Error in the Court of Appeals].

(f) Petitioner further failed to raise any federal question in the Court of Appeals. [See Respondent's Appendix "E", (Appellant's Brief), Appendix "F", (Reply Brief) and Appendix "G", (Motion for Reconsideration)].

Therefore, no constitutional challenge is properly presented for review by this Court.

ARGUMENT

A. Petitioner's Conduct as a Joint Tortfeasor Rendered Him Liable For Contribution To Former Client's Estate

Petitioner's sole basis for appeal to this Court is the alleged illegal and unconstitutional jury charge on the law of contribution.

Two statutes in Georgia authorize a party to seek contribution from another responsible party for damages awarded to an injured third party.

The first, a legal remedy, is O.C.G.A. §51-12-32, which reads as follows:

> (a) Where a tortious act does not involve moral turpitude, contribution among several trespassers may be enforced just as if an action had been brought against them jointly. Without the necessity of being charged by action or judgment, the right of a joint trespasser to contribution from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom.
>
> (b) If judgment is entered jointly against several trespassers and is paid off by one of them, the others shall be liable to him for contribution.
>
> (c) Without the necessity of being charged by an action or judgment, the right of indemnity, express or implied, from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom.

The second, an equitable remedy, is O.C.G.A. §23-2-71, which reads as follows:

> In cases of joint, joint and several, or several liabilities of two or more persons, where all are equally bound to bear the common burden and one has paid more than his share, he shall be entitled to contribution from others; and whenever the circumstances are such that an action at law will not give a complete remedy, equity may entertain jurisdiction.

Although Petitioner did not cite the remedy at law but cited instead – and only – the remedy at equity, it is clear that the Georgia Court of Appeals found that the

remedy at law was adequate and the charge was properly adjusted to the evidence.

As stated by Judge Blackburn, writing for the Court of Appeals of Georgia:

> It is the duty of the trial court to instruct the jury on an issue of law if there is evidence to support the instruction. *Feathers v. Wilson*, 157 Ga. App. 753 (278 S.E.2d 434) (1981).
>
> In essence, Rolleston asserts that he cannot be considered a joint tortfeasor and so cannot be liable for contribution and indemnity. However, the verdict in the Coast House lawsuit was not totally predicated upon Cherry's breach of contract; at least a portion of the award related to Coast House's claim for abusive litigation, which was based on the joint conduct of Cherry and Rolleston. Indeed Cherry and Rolleston had originally been named as joint Defendants on such claim, although the court severed the trials of the two. In his appellate brief, which was personally drafted by Rolleston, Rolleston states that the trial court granted summary judgment to him on all charges, and that the Supreme Court affirmed. This is a misrepresentation of the facts, as the trial court expressly denied Rolleston's Motion for Summary Judgment on the abusive litigation claim and the Supreme Court expressly upheld that denial. See *Cherry v. Coast House, Ltd.*, 257 Ga. 403, 407 (359 S.E.2d 904) (1987). ("We affirm the denial of Summary Judgment [to Rolleston] as to any *Yost v. Torok*, [abusive litigation] claim which might now exist or arise in the future.") Since Cherry's liability to Coast House was at least partially predicated upon acts for which Cherry and Rolleston could

> be considered joint tortfeasors, Cherry was entitled to seek contribution from Rolleston under O.C.G.A. §51-12-32, notwithstanding the fact that Coast House apparently did not pursue its abusive litigation claim against Rolleston, see *Marchman & Sons v. Nelson*, 251 Ga. 475 (306 S.E.2d 240) (1983). Accordingly, the trial court did not err in charging the jury on contribution and indemnity. *Rolleston v. Cherry*, 226 Ga. 750, 487 S.E.2d 354 (1997), [See also Opinion, Appendix "B" to Petitioner's Brief, pp. B15-17].

Mrs. Cherry's entire liability to Coast House et al. for damages for abusive litigation and bad faith attorney's fees in the amount of Three Million Eight Hundred Thousand ($3,800,000.00) Dollars was the direct result of Petitioner Moreton Rolleston, Jr.'s actions at the closing and subsequently in the litigation.

Mrs. Cherry was entitled to seek contribution from Petitioner as a joint tortfeasor, regardless of whether he was a named party or found liable in the underlying lawsuit. Petitioner misleads this Court when he implies that the trial court applied to a legal malpractice case a contribution statute with a statute of limitations of twenty years. As the Statement of the Case demonstrates, the case below was an unusual fact-sensitive scenario where an attorney put himself in conflict with his client by demanding a one-third deeded interest in the subject matter of litigation, and subsequently pursuing his financial interests to the detriment of his client. Petitioner's failure to provide this Court with the facts material to consideration of the questions presented, in violation of this Court's Rule 14(g), is tantamount to an admission

that Petitioner's questions will not survive scrutiny when coupled with the facts.

Petitioner seeks to obtain a writ of certiorari upon a fallacious premise that misstates the evidence and mischaracterizes the posture of the case in the trial court. Petitioner states that "The original complaint was a malpractice suit for alleged professional negligence of an attorney." [Petition, Questions Presented, p. 1]. Petitioner fails to inform the Court that Respondent's Complaint contained five separate counts, including a count for fraud and fraudulent concealment. When Petitioner filed suit on behalf of Mrs. Cherry seeking title to accreted beach front land *he knew* – based upon his prior involvement in the *Bruce* case – that she could never meet the evidentiary standard adopted in 1981 in that case. *State of Georgia v. Bruce,* 248 Ga. 154, 282 S.E.2d 76 (1981).

Respondent contends that Rolleston's failure to disclose this material fact was intentional misrepresentation or fraud rather than professional negligence or malpractice. Not only was the jury authorized to determine that Petitioner's actions were fraudulent, and intended to gain leverage for a settlement to his personal financial advantage in a multi-million dollar land assemblage, but it was further authorized to find that this information was *never disclosed* to Mrs. Cherry, and was later revealed only by the evidence at Petitioner's trial.

Testimony at trial from the late Mrs. Cherry's personal notes, depositions and her underlying Coast House trial testimony evidenced that Mrs. Cherry was entirely convinced by Petitioner's representations that she had a

legitimate claim to the accreted land and that her attorney could have represented her at the closing if the Purchasers had tendered the money. As Judge Blackburn stated: "The jury was authorized to conclude from the evidence that Rolleston intentionally misled his client in order to prevent the closing, so as to avoid a potential malpractice claim for his misdrafting of the purchase agreement." [Opinion, Petitioner's Appendix "B", p. 12].

Likewise, Petitioner quotes Judge Jenrette's charge on contribution and indemnity out of context. In the trial court's main charge, prior to instruction upon contribution and indemnity, the court fully instructed the jury on the four-year statute of limitations for malpractice actions, as well as the tolling of said statute for fraud, including the failure to disclose material facts in a confidential relationship. "As there was evidence from which the jury could infer fraud, the court did not err in instructing the jury on the law of fraud." [Opinion, Petitioner's Appendix "B", p. 13).

The authority cited by Petitioner has no application to the case at bar. The fact that there is no legal malpractice statute of repose whereas the medical malpractice statute of repose has survived constitutional challenges is a matter for legislative action and not for writ of certiorari. However, even if lawyers in Georgia were protected, like physicians, by a statute of ultimate repose, it would not have changed the result in the case *sub judice*. The *Craven* court, cited by Petitioner, notes that a statute of repose does not eliminate liability for malpractice where fraudulent concealment exists, as in this instance, because, similarly to a statute of limitations, the statute of

repose is tolled by fraud. *Craven v. Lowndes County Hospital Authority*, 263 Ga. 656, 437 S.E.2d 308 at 310 (1993).

The foreign jurisdictions cited by Petitioner are clearly distinguishable. Neither the *Bunker* case [*Bunker v. Bunker*, 80 A.D. 2d 817, 437 N.Y.S. 2d 326 (1981), cited by Petitioner as "*Bunker v. Maccaro*"] nor the *Griggs* case [*Griggs v. Nash*, 116 Idaho 228, 775 F.2d 120 (Idaho, 1989)] involve an independent tort against a third party where either the client, the attorney or both bear responsibility for damage to the third party, as in the case at bar.

The *Bunker* case involves a former husband seeking recovery from his attorney based on incompetent representation resulting in his financial obligations incurred in his divorce settlement and is not supported by any statutory basis for contribution or indemnity. The *Griggs* case is also readily distinguishable because the claims of a third-party plaintiff against the attorney had no basis in the Idaho statutory scheme for contribution or indemnity. In particular, the Idaho Court noted that contribution was only available as to a joint tortfeasor, and the attorney was not asserted to be a joint tortfeasor. In the case at bar, there is an evidentiary basis for Petitioner's liability as a joint tortfeasor. [Opinion, Petitioner's Appendix "B", pp. 7 and 8].

The case of *Gray v. Wallman & Kramer*, 224 A.D. 2d 275, 638 N.Y.S. 2d 18 (A.D. 1 Dept. 1996) bears a greater factual similarity since it concerns an attorney's motion to dismiss a third party complaint by his client based on his failure to properly represent her in a failed closing. However, upon scrutiny, not only did the attorney have no

personal stake in the litigation giving rise to an independent tort against a third party, but the New York court found that, although styled as a claim for indemnity, a viable cause of action for malpractice existed, based on the facts in dispute, and it affirmed the trial court's denial of the attorney's motion to dismiss. None of the foreign cases stands for the proposition that an attorney can never be held liable to a client for indemnity or contribution, and they have no precedential value with respect to the case at bar.

Mrs. Cherry's claims for contribution and indemnity did not arise until her Estate incurred damages as a result of Rolleston's tortious acts. Where the attorney is an active tortfeasor, an action for contribution and indemnity will arise pursuant to both law and equity. It is not necessary for the tortfeasor to be joined in the original suit. *Greyhound Lines, Inc. v. Cobb County Georgia*, 681 F.2d 1327 (11th Cir. 1982). Even the dismissal of the Appellant in the underlying suit does not affect this claim. *Marchman & Sons, Inc. v. Nelson*, 251 Ga. 475, 306 S.E.2d 290 (1983). In the case of joint tortfeasors, the passive tortfeasor has an action against the active tortfeasor. *Jova-Daniels-Busby, Inc. v. B & W Mechanical Contractors, Inc.*, 167 Ga. App. 551, 307 S.E.2d 97 (1983).

Appellee's claims for contribution and indemnity are not claims ancillary to professional negligence, but are independent actions arising out of Appellant's purposeful deception and fraud in gross conflict of interest with his client as well as his abusive litigation tactics pursued to delay the day of final reckoning and isolate his client from the truth. Therefore, the trial court's charges on

contribution were a correct statement of the law, properly adjusted to the evidence.

Petitioner's conclusion that the Court of Appeals ruling "abrogates the two-year tort and four-year contract statutes of limitation," leading to endless liability for attorneys is an absurd conclusion, illogically constructed upon a fallacious premise. The clear implication of the jury's verdict and the Court of Appeals decision is that an attorney who interjects himself into a client's business, obtains an interest in the subject matter of the litigation, never discloses his conflicts of interest and actively conceals knowledge that is material to the client's welfare, to protect himself against a malpractice claim and for his personal gain, does so at his risk and peril. The public, through the voice of a jury of his peers, did not tolerate Petitioner's actions. The Court of Appeals panel, unanimously concurring with Judge Blackburn's strongly worded opinion, did not condone Petitioner's abuse of his confidential relationship to Respondent's Decedent. Petitioner's Brief misrepresents the underlying record and fails to demonstrate either reason or authority entitling Petitioner to the grant of Writ of Certiorari.

B. This Court Lacks Jurisdiction to Consider a Constitutional Question Raised For the First Time in Petitioner's Application to the Supreme Court of Georgia for Writ of Certiorari.

It is black-letter law in Georgia from time immemorial that a constitutional question *must be raised in the first instance* to serve as ground for appeal in a higher court.

> *"Jurisdiction is not vested in the Supreme Court merely because it is contended that an action or judgment is or would be contrary to some provision of the Constitution." (Cite omitted) A constitutional question cannot be raised for the first time in the Supreme Court. Where it is sought to invoke a ruling by the Supreme Court on a constitutional question, the question must have been raised in the trial court and a ruling made thereon and the case brought to the Supreme Court for review.* (Cites omitted) *Aiken v. Richardson*, 207 Ga. 735, 64 SE 2d 54 (1951).

This is true regardless of the level at which the "first instance" occurs, as the following examples illustrate:

> **1) On appeal from an administrative agency to Superior Court:**
>
> *This same rule has been applied to constitutional challenges first raised in the superior courts, rather than in the state agency in which the proceeding commenced: The reason for this requirement is to give the appropriate body – at the first instance – an opportunity to rectify the situation.* (Cites omitted.) *State Board of Equalization et al. v. Trailer Train Company et al.*, 253 Ga. 449, 320 SE 2d 758 (1984).
>
> **2) On appeal from trial court to Court of Appeals:**
>
> *This raises the issue of our jurisdiction . . . since sole jurisdiction to consider the constitutionality of a statute rests in the Supreme Court. . . . However, in this instance, a constitutional issue is not raised because there is no suggestion on the record sent up from the trial court. . . . Since the constitutionality of no statute was ruled upon by the trial court, and since we may not address questions on appeal which*

were not passed on by the trial court, no question as to the constitutionality . . . is presented for appellate review. (Cites omitted.) *Dye v. Georgia*, 205 Ga. App. 781, 423 S.E. 2d 713 (1992).

3) On appeal from trial court to the Supreme Court:

The record shows that this act was neither considered nor ruled upon at the trial of this case. "This Court will never pass upon the constitutionality of an act of the General Assembly unless it clearly appears in the record that the point was directly and properly made in the court below and distinctly passed on by the trial judge." Yarbrough v. Georgia Railroad & Banking Co., 176 Ga. 780, 168 S.E. 873 (1933).

The requirement of raising the constitutional question in the first instance as a condition precedent for review in a higher court is strictly respected by this court. Petitioner has failed to comply with Rule 14(g), (i) of this court which requires him to specify

> the stage in the proceedings when the federal questions sought to be reviewed were raised, the method or manner of raising them and the way in which they were passed on by those courts, and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matters appear (e.g., court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this court has jurisdiction to review the judgment on a writ of certiorari. Rule 14(g), (i) of Rules of the Supreme Court of the United States.

In token compliance with Rule 14, Petitioner stated that the constitutional questions were first raised in the appeal to the Court of Appeals of Georgia. This is a brazen misrepresentation to this Court, as review of every argument posited by Petitioner in the Court of Appeals on the issue of contribution readily demonstrates. (See Respondent's Appendices "D", "E", "F" and "G".) Petitioner has not even attempted to cite from the record or transcript of the trial court, or the numerous briefs filed by Petitioner himself in the Georgia Court of Appeals to demonstrate prior consideration of his arguments, nor has he referenced any authority for his assertion that this Court has jurisdiction to consider such latter-day arguments. The logical conclusion to be drawn from such failure is that Petitioner is unable to provide authority or record citations because none exists. Therefore, logic dictates that Petitioner's constitutional argument – which Petitioner failed to raise in either the trial court or the Georgia Court of Appeals – is fatally out of time and out of place and will not be considered.

It is well-settled that in order to raise a question as to the constitutionality of a "law," at least three things must be shown:

> (1) the statute or the particular part or parts of a statute which the party would challenge must be stated or pointed out with fair precision; (2) the provision of the Constitution which it is claimed has been violated must be clearly designated; and (3) it must be shown wherein the statute, or some designated part of it, violates such constitutional provision. (Cites omitted.) *Turk v. State Highway Dept.*, 226 Ga. 245, 174 SE 2d 791 (1970).

Even in this untimely application, Petitioner has failed to comply with the rudiments of the showing necessary to consideration of constitutional questions at any administrative or judicial level.

In order to invoke entitlement to "equal protection," Petitioner must first demonstrate that he is a member of a suspect class that is the subject of statutory discrimination. The only statute cited by number in Petitioner's Brief is O.C.G.A. §23-2-71, for equitable right of contribution although an equal right of contribution and indemnity clearly arises under tort statute O.C.G.A. §51-12-32 as well. Moreover, neither statute applies to any profession nor any segment of any profession, per se, but only to those persons whose role in a joint enterprise renders them either wholly or partially liable for damages to a third party.

The sole issue faced by the jury with respect to contribution and indemnity was "Would Mrs. Cherry have incurred liability to Coast House and Sandease in the underlying suit, *but for the conduct of Moreton Roilleston?*" The Georgia Court of Appeals found that evidence in the record supported jury charges to this effect.

Lawyers have no constitutional right by virtue of their profession to escape liability for their acts which expose their clients to grave injury. This is particularly true where the lawyer has ignored the professional standards of conduct promulgated by the Georgia State Bar, and acted in direct conflict with the economic interests of his client, as in the case at bar. Rare is the lawyer who will defend a client against a money judgment free of

charge for almost three years in cross-claims, counter-claims, interlocutory appeals, cross-appeals, and even a detour to this Court, on petition for Writ of Certiorari, as did Petitioner, unless such representation is ultimately for his own self-protection and to prevent his client's access to independent counsel. Petitioner did not incur liability to Respondent because he represented a defendant in an adverse money judgment, but because his actions in the furtherance of his own interest caused or contributed to the adverse judgment against his former client. To now invoke a right to equal protection for such action is a travesty of the safeguards against governmental discrimination contained in the Fourteenth Amendment and Article I, §1, ¶ 2 of the Georgia Constitution.

Petitioner's argument that the contribution charge constituted an "illegal takings" or "deprivation of advantage to property" in violation of the Fifth Amendment and the Constitution of the State of Georgia, Article I, Section, III, Paragraph I(a) is equally specious. The property at issue (higher cost of legal malpractice premiums) is not menaced by government taking for *public use*, which is the threshold issue pursuant to the very clear language of both the federal and state constitutions. Not only is no state action involved, but there is no state requirement for lawyers to maintain malpractice insurance and thus, no legal basis for a takings argument. Petitioner's argument that malpractice premiums will increase if the jury's assessment of liability stands is totally speculative and totally ignores the inference of intentional misconduct and fraudulent misrepresentation found by the Court of Appeals. Moreover, such conduct is

not an insured risk under the errors and omissions provisions of malpractice insurance policies.[1] Petitioner is presently appealing in the Eleventh Circuit Court of Appeals an order of Judge Tidwell denying malpractice insurance coverage to Petitioner pursuant to the Dishonest Acts Exclusion of his policy. *Rolleston v. St. Paul Fire & Marine Insurance Company,* United States District Court for the Northern District of Georgia, Atlanta Division, Civil Action No. 1:95-CV-1081 (GET).

To summarize, Petitioner cannot seek a writ of certiorari in this Court to review constitutional questions that were not raised in the trial court or the Court of Appeals of Georgia. However, even if this option were available to Petitioner, he has failed to set forth the elements of a constitutional challenge. Moreover, Petitioner cannot under any circumstances demonstrate the requisite discriminatory state action necessary to trigger constitutional safeguards. Petitioner's invocation of constitutional protection against his personal liability on a money judgment in favor of Respondent would be merely a dismal pleasantry were not the subject so serious and the damage to Respondent and its Decedent so extreme.

---

[1] "The jury was authorized to conclude from the evidence that Rolleston intentionally misled Mrs. Cherry" (Opinion, p. 12). "As there was evidence from which the jury could infer fraud, the court did not err in instructing the jury on the law of fraud" (Opinion, p. 13).

CONCLUSION

The decision of the Court of Appeals of Georgia is in accordance with the law of Georgia and the Constitutions of the State of Georgia and the United States. Petitioner has failed to show that he has been denied due process, that his property has been taken or damaged for public use or that he has been denied the equal protection of the laws. Respondent Estate of Rebecca Wright Cherry Sims submits that for these reasons stated above, the Petition of Moreton Rolleston, Jr., for Writ of Certiorari should be denied.

Respectfully submitted,

SHELBY A. OUTLAW
THE OUTLAW FIRM
315 Sycamore Street
Decatur, GA 30030
(404) 371-9588

Counsel for Respondent

Dated: April 3, 1998

APPENDIX A

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ESTATE OF REBECCA WIGHT CHERRY SIMS, JOHN RANDOLPH CHERRY, Executor, Plaintiff,	]	CIVIL ACTION FILE NO. D97003
v.	]	
MORETON ROLLESTON, JR., Defendant.	]	

JUDGMENT ON JURY VERDICT

(Filed Apr. 7, 1995)

This action having come on for trial before the Court and a jury, the Honorable Isaac Jenrette, presiding, and the issues having been duly tried, and the jury having duly rendered its verdict (attached hereto as Exhibit "A"),

IT IS HEREBY ORDERED AND ADJUDGED

That the Plaintiff, The Estate of Rebecca Wight Cherry Sims, John Randolph Cherry, Executor, shall recover of the Defendant, Moreton Rolleston, Jr., the principal sum of FIVE MILLION ONE HUNDRED THOUSAND ($5,100,000.00) DOLLARS, plus expenses of litigation in the amount of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS, together with the costs of this action and Judgment is hereby entered for said amount;

That the Plaintiff, The Estate of Rebecca Wight Cherry Sims, John Randolph Cherry, Executor, shall

recover of the Defendant, Moreton Rolleston, Jr., post-judgment interest thereon at the rate of twelve percent (12%) per annum as provided by law, on the principal sum of FIVE MILLION ONE HUNDRED THOUSAND ($5,100,000.00) DOLLARS to the date of satisfaction of said principal sum and Judgment is hereby entered for said amount; and

Plaintiff filed its affidavit showing demand was made via certified mail on January 13, 1993 for unliquidated damages in the amount of One Million ($1,000,000.00) Dollars and Defendant having failed to satisfy said demand within the time required by O.C.G.A. §51-12-14, the Plaintiff, The Estate of Rebecca Wight Cherry Sims, John Randolph Cherry, Executor, shall further recover of the Defendant, Moreton Rolleston, Jr., pre-judgment interest in the amount of Two-Hundred Fifty-Two Thousand Four Hundred Ninety-Three and 15/100 ($252,493.15) Dollars, pursuant to O.C.G.A. §51-12-14, said amount being interest at the rate of twelve percent (12%) per annum running from thirty days after Plaintiff's unliquidated damages demand on January 13, 1993, to the date of Judgment on March 22, 1995. Judgment is hereby entered for said amount.

This 6th day of Apr. 1995.

/s/ Isaac Jenrette
The Honorable
Isaac Jenrette, Chief Judge
Fulton County
Superior Court

Presented by:

/s/ Shelby A. Outlaw
SHELBY A. OUTLAW
Georgia State Bar No. 555740

/s/ Scott M. Kaye
SCOTT M. KAYE
Georgia State Bar No. 409310

ATTORNEYS FOR PLAINTIFF
THE OUTLAW FIRM
315 Sycamore Street
Decatur, Georgia 30030
(404) 371-9588

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

ESTATE OF REBECCA WIGHT CHERRY SIMS, JOHN RANDOLPH CHERRY, Executor

Plaintiff

vs

MORETON ROLLESTON, JR.

Defendant

CIVIL ACTION

CASE NO. D-97003

VERDICT

We the jury find for the plaintiff and award damages as follows:

1.	Actual Damages	$5,100,000
	plus any interest	$ 0
2.	Expense of Litigation including attorneys fees	$100,000
	Total	$5,200,000

We find that punitive damages should be awarded ( ) Yes (X) No.

OR

We the jury find for the defendant. ( )

This the 22nd day of March, 1995.

/s/ James A. Robbins, Jr.
FOREPERSON

APPENDIX B

Court of Appeals

of the State of Georgia

ATLANTA, JUNE 11, 1997

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

Case No. A97A0056

MORETON ROLLESTON, JR. V. JOHN RANDOLPH CHERRY, EXECUTOR OF THE ESTATE OF REBECCA WIGHT CHERRY SIMS

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta
JUN 11, 1997

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ William L. Martin
Clerk.

Court of Appeals

of the State of Georgia

ATLANTA, JUNE 11, 1997

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

Case No. A97A0051

MORETON ROLLESTON, JR. V. JOHN RANDOLPH CHERRY, EXECUTOR OF THE ESTATE OF REBECCA WIGHT CHERRY SIMS

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta
JUN 11, 1997

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ William L. Martin
Clerk.

APPENDIX C

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: October 31, 1997

Shelby Outlaw
THE OUTLAW FIRM
315 Sycamore Street
Decatur GA 30350

Case No. S97C1616

MORETON ROLLESTON, JR. V. JOHN RANDOLPH CHERRY, EXEC.

COURT OF APPEALS CASE NO. A97A0051 A97A0056

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Sears, J., not participating.

Sincerely,

Sherie M. Welch, Clerk

APPENDIX D

IN THE
COURT OF APPEALS
OF THE STATE OF GEORGIA

MORETON ROLLESTON, JR. Appellant, Vs. ESTATE OF REBECCA WIGHT CHERRY SIMS, JOHN RANDOLPH CHERRY, EXECUTOR Appellee	)	CASE NUMBERS A97A0051 and A97A0056

ENUMERATION OF ERRORS

Moreton Rolleston, Jr.
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3350 Cumberland Circle., N.W.
Atlanta, Georgia 30339
770/850-1816

Rush S. Smith, Jr.
Sullivan, Hall, Booth & Smith
Suite 800 – One Midtown Plaza
1360 Peachtree Street, N.E.
Atlanta, Georgia 30309
404/870-8000

ENUMERATION OF ERRORS

1.

The Court erred in failing to charge (1) that a two year statute of limitations applies to torts; (2) that a four

year statute of limitations applies to contracts; and (3) that a two year statute of limitations applies to any wrongful act regarding **fiduciary duty** and erred in permitting testimony of the Estate's experts regarding fiduciary duties of Rolleston after he resigned representation of Cherry in **October 1988.**

2.

The court erred in charging the jury that Rolleston court be held liable for **contributions and indemnity** and that the applicable statute of limitations for contribution and indemnity was twenty years.

3.

The Court erred in not holding that **Taylor Jones's letter** of April 17, 1989 constituted a **release** of claims against Rolleston.

4.

The court erred in failing to charge O.C.G.A. 13-8-2 which defines **champerty** and in failing to charge the jury that the settlement contract between Coast House and the Cherry Estate was void as against public policy and in failing to charge the jury that the assignment to Coast House of the Estate's claim against Rolleston was illegal in violation of O.C.G.A. 44-12-24.

5.

The court erred in failing to charge the jury that **the limit of damages,** if any, was the actual loss of **$500,000,** which was the sales price of the house taken by Coast House, plus attorneys fees in the Coast House litigation.

6.

The court erred in the excessive, unduly broad and prejudicial charges of what constituted **fraud** and in placing undue emphasis on what constituted fraud by mentioning the word "fraud" 25 times, when there was no testimony re fraud.

7.

The court erred in refusing to charge the jury with defendant's request for charge that Cherry **ratified** all of the acts of Rolleston, her attorney and agent.

8.

The court erred in charging the jury that a violation of the **Standards of Conduct** constituted legal malpractice. The court used the term "Rules of Professional Conduct" rather than the proper term "Standards of Conduct".

9.

The court erred in failing to charge the jury, as requested, that a **legal opinion** rendered by a lawyer, even if in error, does not constitute malpractice.

10.

The Court erred in denying Rolleston's **motion for summary judgment** and Rolleston's **motion for a directed verdict.**

Pursuant to Rule 22 (c), the Court of Appeals has Appellate Jurisdiction of this case pursuant to Article 6, Section 5, Paragraph 3 of the Georgia Constitution and is not a case over which the Supreme Court of Georgia has exclusive or general Appellate Jurisdiction.

The first Complaint filed for "Contribution, Indemnity and Damages" appears at Record 15. This Complaint was amended by filing an entirely new Complaint for "Contribution, Indemnity and Damages" which appears at Record 938.

/s/ Moreton Rolleston, Jr.
Moreton Rolleston, Jr.
Pro Se
Georgia Bar No. 613700

IN THE
COURT OF APPEALS
OF THE STATE OF GEORGIA

MORETON ROLLESTON, JR. Appellant, Vs. ESTATE OF REBECCA WIGHT CHERRY SIMS, JOHN RANDOLPH CHERRY, EXECUTOR Appellee	)	CASE NUMBERS A97A0051 and A97A0056

CERTIFICATE OF SERVICE

I hereby certify that I have served counsel of record with the within and foregoing Enumeration of Errors by mailing a copy of same to the following named counsel of record at the correct mailing address with sufficient postage affixed thereto, as follows:

Ms. Shelby Outlaw

315 Sycamore Street

Decatur, Georgia 30030

This 11th day of September, 1966 [sic].

/s/ Moreton Rolleston, Jr.
Moreton Rolleston, Jr.

APPENDIX E

IN THE
COURT OF APPEALS
OF THE STATE OF GEORGIA

MORETON ROLLESTON, JR.	)	CASE NUMBERS
Appellant,	)	A97A0051 and A97A0056
Vs.	)	
ESTATE OF REBECCA WIGHT CHERRY SIMS, JOHN RANDOLPH CHERRY, EXECUTOR	)	
Appellee	)	

BRIEF OF APPELLANT

Moreton Rolleston, Jr.
Suite 1870 – Riverwood 100
3350 Cumberland Circle., N.W.
Atlanta, Georgia 30339
770/850-1816

Rush S. Smith, Jr.
Sullivan, Hall, Booth & Smith
Suite 800 – One Midtown Plaza
1360 Peachtree Street, N.E.
Atlanta, Georgia 30309
404/870-8000

* * *

3. STATUTE OF LIMITATIONS – CONTRIBUTION AND INDEMNITY

The Court charged that there was a 20 year statute for contributions and indemnity. In the instant case all the grounds set forth in the complaint are barred by the statute of limitations for tort and contract. Even if there were any liability upon a lawyer for contribution and indemnity to his client because the client lost a jury trial, it is obvious that a 20 year statute would mean that all attorneys whose clients suffered money damages would be fair game for a malpractice suit for contribution or indemnity for 20 years after every case they tried. Such a situation would be so intolerable to lawyers that most clients would have a hard time finding an attorney to represent them. The instant case involved a jury trial in which Rolleston was neither a party nor attorney nor witness.

In addition, contribution is only available to a joint tort feasor and the claim that an attorney is liable for the torts of a client has no basis in the law. (O.C.G.A. 51-12-13 (a)).

The trial court in this action charged the jury that it could require Rolleston to indemnify the Estate without regard to the standard of care or a finding of legal malpractice, and that the statute of limitations for such claims was 20 years. (Transcript Excerpts; charges pages 28 and 25)

Over Rolleston's exceptions to charge (Transcript Excerpts, charges, page 1), the Court charged the following:

" . . . the plaintiffs also contend that they are entitled to recover any loss suffered as a result of the recovery of any losses suffered because of the defendant's negligence or other acts under the theory of contribution or indemnity. (emphasis added). And I charge you that ordinarily one person, if one person is compelled to pay damages because of negligence imputed to him or her as a result of a tort committed by another, he or she may maintain an action over for indemnity or contribution against the person whose wrong has thus been imputed to him, but this is subject to the *proviso* that no personal negligence of his own has joined in causing the injury . . . "

"Now ladies and gentlemen, I further charge you with respect to indemnity and contribution from the defendant as follows: in order to recover, ladies and gentlemen, on such a theory, the plaintiff must prove as follows: that the plaintiff has a legal liability to compensate a third party for an injury; that the defendant is responsible in whole or in part for the injury to the third party. Consequently, the plaintiff has the right to receive indemnification or contribution from the defendant to the extent of damage for which the plaintiff has been found liable." (Transcript Excerpts, Jury charges, p. 23).

"I charge you that the statute of limitations for contribution and indemnity is 20 years, and all actions for enforcement of rights occurring to individuals under the statute must be brought within 20 years after the right of action accrues. I further charge you that a claim for contribution based on tort does not accrue and the statute of limitations does not start to run until the

> judgment is entered on the principal suit." (Transcript Excerpt, Jury charges, page 25).

It is interesting that the jury made the following request:

> "Can we have a recharge and/or explanation on contribution and indemnity and its statute of limitations?" (T102)

Then the jury awarded $5,200,000 to match the jury verdict against the Cherry Estate of $3,800,000 plus interest for four years.

In two recent medical malpractice cases this Court has held that the basis of the complaint was professional negligence even though the complaints were couched in terms of indemnity and contribution. See **Kraseath v. Parker,** 212 Ga. App. 525 (1994).

> "Although the claim is couched as one for contribution, but for the Statute of Repose would have been timely, **substance prevails over form.** (emphasis added). Recovery is predicted on proof of Dr. Krasaeath's professional negligence. Plaintiff cannot be permitted to do indirectly what the law does not permit her to directly."

See **Gwinnett Place Associates, L.P. v. Pharr Engineering, Inc.,** 215 Ga. App. 53 (1994)

> "We hold, therefore, that despite being couched in terms of indemnification, this claim, like the contribution claim in *Krasaeath,* [sic] is within the contemplation of the statute of repose."

There may be no indemnity between client and attorney where the client knows what is happening, knows the facts, approves of the actions of the attorney and

thereby ratifies them. In the instant case the evidence was conclusive that Cherry was aware of all material facts and approved of all the actions of Rolleston, her attorney, as shown by her affidavits, her depositions, her actions in court, the Estate's complaint (Paragraphs 39 through 41 and paragraph 59.) and the very words of the Judge who presided at the final jury trial in February 1991.

* * *

APPENDIX F

IN THE COURT OF APPEALS OF THE STATE OF GEORGIA

MORETON ROLLESTON, JR. Appellant, vs. ESTATE OF REBECCA WIGHT CHERRY SIMS, JOHN RANDOLPH CHERRY, EXECUTOR Appellee.	CASE NUMBERS A97A0051 and A97A0056

REPLY BRIEF OF APPELLANT

SULLIVAN, HALL, BOOTH & SMITH, P.C.
1360 Peachtree Street, N.E.
Suite 800
Atlanta, GA 30309
404-870-8000

* * *

III

It was error for the Court to charge the jury on contribution and indemnity as a basis for the Defendant's liability and the twenty-year statute of limitation thereon and to deny the Appellant's Motions for Directed Verdict on this issue.

Appellee suffered a $3.8 million verdict in the underlying action. In this legal malpractice action, over the

exceptions of counsel, the Court charged (and then shortly before the verdict was rendered, recharged, (Transcript Vol. IV pages 559 and 560) that "(1), the Plaintiff had a legal liability to compensate a third party for an injury. (2), the Defendant is responsible in whole or in part for the injury to the third party. (3), consequently the Plaintiff has the right to receive indemnification or contribution from the Defendant to the extent of the damages for which the Plaintiff has been found liable. * * * No. 5, the defendant shall be liable to indemnify the plaintiff in the entire amount of the judgment if he is found to be wholly responsible for the injury. When I say wholly responsible, if the injury was caused by his acts, whether it be malpractice or fraud, breach of fiduciary duty, . . . I charge you that the statute of limitations for contribution and indemnity is twenty years." (Transcript Vol. IV, pages 559-560)

Prior to rendering its verdict, the jury specifically requested and was given a recharge. (Exhibits Vol.II, p. 1021) Both charge and recharge were excepted to. (Transcript, Vol.IV, p. 534, pp. 559-561.)

Given the Court's charge, if accepted as the law of Georgia, every verdict against a party allegedly the result of legal malpractice or breach of fiduciary duty, etc. will start the statute of limitations running with a twenty-year time period.

There is no law on this subject in Georgia other than this Court's common sense. However, in **Bunker v. Maccaro,** 437 N.Y.S. 2d 326 (1981) an attorney representing a party in a divorce proceedings was sued in a third-party action for indemnity in connection with the settlement

agreement reached between husband and wife. The New York court held "a third-party action does not become an action for indemnity merely because the pleader has so denominated it." The court held the claim for indemnity barred.

The only other case we have found is *Griggs v. Nash*, 775 P.2d 120 (Idaho, 1989) which was an action against an attorney seeking indemnity or contribution based upon an alleged breach of fiduciary relationship and negligence. The court held the claim to be barred by the statute of limitations in Idaho, two years, and not subject to the longer statute of limitations in Idaho for contribution or indemnity.

Appellee cites *Marchman v. Nelson*, 251 Ga. 475 (1983) (Brief, p. 22) for the proposition that the fact Appellant was dismissed from the underlying suit does not prevent the finding that he was a joint tortfeasor with Appellee. (Appellee Brief, p. 22) However, *Marchman* acknowledges the requirement that contribution or indemnity defendants must be joint tortfeasors before saying that a settling and dismissed defendant is still a joint tortfeasor as there was no adjudication on the merits. *Marchman*, supra at 477. In the underlying case, Appellant was granted summary judgment (three times) and held not to be a joint tortfeasor with Appellee.

IV.

Appellant's Enumeration of Errors No. 10 mistakenly claimed error that incorrect legal opinions do not constitute negligence. While true, the error complained of is the refusal to charge defendants Request No. 55 (Record, p.

1568) which was expected to. (Record, p. 539) The argument is the same with regard to fraud.

Respectfully Submitted,

SULLIVAN, HALL, BOOTH
& SMITH, P.C.

/s/ Rush S. Smith, Jr.,
RUSH S. SMITH, JR., ESQ.
Georgia Bar Number 663362
Attorneys for Appellant

One Midtown Plaza, Suite 800
1360 Peachtree Street, N.E.
Atlanta, GA 30309
404/870-8000

/s/ Moreton Rolleston, Esq.
Moreton Rolleston, Esq.
Georgia Bar Number 613700

APPENDIX G

IN THE COURT OF APPEALS OF THE
STATE OF GEORGIA

MORETON ROLLESTON, JR. Appellant, vs. ESTATE OF REBECCA WIGHT CHERRY SIMS, JOHN RANDOLPH CHERRY, EXECUTOR Appellee.	)	CASE NUMBERS A97A0051 and A97A0056

MOTION FOR RECONSIDERATION

SULLIVAN, HALL, BOOTH & SMITH, P.C.
1360 Peachtree Street, N.E.
Suite 800
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404-870-8000

* * *

III.

Although the Court did choose to address the issue with regard to contribution and indemnity, the Court misapplied existing case law (*Cherry v. Coasthouse Ltd.*, 257 Ga. 403 (1987)) and completely failed to address the important issue as to whether a lawyer can ever be sued

for contribution or indemnity by a client for claims arising from the representation. These issues were addressed in the Appellant's Brief, p. 20, incorporating pages 8 through 10 of the Reply Brief.

What the Court has misunderstood in the *Cherry v. Coasthouse Ltd.*, supra [sic] opinion was explained in the Reply Brief to Appellee's Motion to Dismiss in this action. It is true that the trial court did not initially dismiss the pending Yost claim against Mr. Rolleston. This is because, at the time summary judgment was granted, Coasthouse [sic] had amended its Complaint to assert yet an additional claim of liability against Mr. Rolleston, individually, which was not adjudicated on the first summary judgment. Because there was still one other claim, in addition to the Yost claim, pending against Mr. Rolleston at the time the Supreme Court decided that matter, the trial judge was affirmed because Mr. Rolleston was still a party to that suit. This reasoning is conclusively proven because when the case was remanded, a subsequent summary judgment motion was filed and all other grounds pending against Mr. Rolleston in the *Coasthouse* [sic] case were dismissed, except for the *Yost* claim. Then, upon further motion, the trial judge decided that since no other claims were asserted against Mr. Rolleston other than the Yost claim, it could not be brought against him since *Yost* only applied to a party. And, Judge Eldridge reasoned, since Mr. Rolleston was no longer a party in the litigation *except* as a Yost defendant, then it could not be brought against him. The Yost claim was then dismissed, *prior* to Ms. Cherry's death and prior to the subsequent dismissal of the *Coasthouse* [sic] lawsuit and its refiling. (Note: While not a part of the Record in this case, because of the

Court's apparent misunderstanding of the Appellant's Brief, the attached is offered, not for consideration by the Court but to show that Appellant may have misremembered the time of Judge Eldridge's orders, he did not materially misrepresent the overall outcome.) (See Exhibit A, a copy of the February 9, 1989 Order of Judge Frank M. Eldridge in *Coasthouse* [sic], *et al. v. Cherry and Rolleston,* Civil Action No. D-27179. That is the reason that Mr. Rolleston was not named as a party in the new suit as, by that time, every claim pending against him including the Yost claim had been adjudicated in his favor. Hence, Mr. Rolleston could not be held to be a joint-tortfeasor with Mrs. Cherry and cannot be required to indemnify her estate.

* * *